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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-279

PALLADIO, INC.,

Petitioner,

against

HENRY A. DIAMOND, as Commissioner of the Department of Environmental Conservation of the State of New York, DON J. WICKHAM, as Commissioner of Agriculture and Markets of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, FRANK S. HOGAN, as District Attorney of New York County, and HOWARD R. LEARY, as Police Commissioner of the City of New York,

Respondents.

REPLY BRIEF OF PETITIONER

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The basic question remains unanswered; why is this petitioner, whose business life is at stake, not entitled to a trial on the merits? We suggest that the respondent, in an effort to deny that which is afforded the worst felon, has erred in its statement of the facts and misconceived the applicable principles of law.

Respondent's statement that the facts and issues of law herein are "virtually identical" with those before the Court in *A. E. Nettleton Co.* v. *Diamond,* app. dism. sub-nom *Reptile Products Assoc.* v. *Diamond,* 401 U. S. 969

(*Nettleton* hereinafter) is erroneous in the following respects:

Contrary to the facts at Bar, there is not a word in *Nettleton* challenging the basis of respondent's contention,* and the fulcrum of the lower court's decisions, that commerce in the 22 species of foreign Crocodylia "in abundant supply" must be prohibited because their skins "are indistinguishable" from the skins of the 4 species considered endangered (75A).

The record at bar contains verified statements from knowledgeable individuals that the foregoing conclusion is completely erroneous and that, on the contrary, the processed skins of the different species and sub-species are readily distinguishable and must be readily distinguishable, citing as proof thereof, the enormous disparity in the prices of the skins of the different species.

It is unquestionable, we suggest, that the petitioner's challenge to the lower Court's holding that the skins of the species cannot be distinguished is a basic issue which can be resolved only by a trial upon the merits before a 3 judge Court.

We need hardly belabor the concept that if the 3 judge Court find, as a fact, that the skins of the different species are distinguishable, then the Mason Act is unconstitutional because it is too broad.

> *Weaver* v. *Palmer*, 270 U. S. 402;
> *Peo. ex rel. Silz* v. *Hesterberg*, 211 U. S. 31 at 38.

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* The contention was advanced by Dr. King in August, 1970 (66a-67a) and adopted by all the lower courts (75a). However, we have just learned that Dr. King, at the request of a grand jury in the Southern District of New York, has unquestionably examined the inventories of various skin dealers to determine whether their inventories contained the skins of any species of Crocodylia contained on the Federal Foreign Endangered Species List. Evidently, Dr. King has learned how to distinguish the skins of the several species, and thus upheld petitioner's statement that the skins are distinguishable.

Similarly respondent's second, and last, factual contention that the leather industry engages in rolling exterminations of the many species of Crocodylia was likewise left unanswered, let alone challenged in *Nettleton.* On the other hand, in the case at Bar, the contention was exposed as erroneous and flatly contradicted under oath by knowledgeable individuals.

It is respectfully suggested that these 2 issues are issues of fact, the resolvement of which would determine whether or not the Mason Act violated the constitution. Is not, therefore, the petitioner entitled to an opportunity to prove at a trial, that the processed skins of the 22 species of Crocodylia in "abundant supply" are distinguishable and that the industry has not engaged in rolling exterminations of any of the species?

2. Respondent's repeated statements and suggestions that the petitioner's sole recourse is to the Legislature, whose findings are binding upon the Courts, is a complete misconception of the law, repeatedly enunciated by this Court. Indeed, in citing *Peo. ex rel. Silz* v. *Hesterberg,* 211 U. S. 31, the respondent has cited one of the leading authorities rejecting its own argument. In the cited case Mr. Justice Day, speaking for an unanimous Court, enunciated the principle so succinctly at 211 U. S. 38, 39 that its verbatim quotation is in order.

> "That the Legislature of the state is not the final judge of the limitations of the police power, and that such enactments are subject to the scrutiny of the courts and will be set aside when found to be unwarranted and arbitrary interferences with rights protected by the Constitution in carrying on a lawful business or making contracts for the use and enjoyment of property, is well settled by former decisions of this court. *Lawton* v. *Steele,* 152 U. S. 137, 37 L.

ed. 388, 14 Sup. Ct. Rep. 499; *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Dobbins* v *Los Angeles*, 195 U. S. 236, 49 L. ed. 178, 25 Sup. Ct. Rep. 18."

Incidentally, we disregard for the nonce the conceded fact that the New York Legislature did not even hold hearings, let alone make findings in connection with the Mason Act. Even if it had, it is of course clear that its findings are not binding upon the courts which alone bear the constitutional responsibility for protecting citizens from "unwarranted and arbitrary interferences with rights protected by the Constitution in carrying on a lawful business."

3. The respondent's attempt to negate the petitioner's charge that the Mason Act is an extension of the police power far beyond that ever even considered, let alone upheld by any Court, is revealed to be spurious. In support of its argument that the courts have constitutionally upheld a state's law controlling possession and use of out-of-state wild life in the state, respondent has cited 4 cases. In every one of those cases, the state law was upheld solely upon the ground that because of the identity of the out-of-state wild life with that of the state, the law was the only method by which the state could protect its own indigenous wild life. Indeed, the basic concept was clearly expressed in another of one of the 4 cases cited by respondent, namely *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422. In *Bayside* this Court upheld a California law controlling the importation of herring into California. But Mr. Justice Sutherland, speaking for a unanimous Court, made clear that it did so solely on the ground that the law's purpose was to conserve the fish supply of the state, in these words at 297 U. S. 427, 428

> "These provisions have a reasonable relation to the object of their enactment—namely, the conservation of the fish supply of the state . . ."

The respondents have wholly failed to refer to a single case upholding a state's right to limit or control the importation into the state of foreign wild life completely unrelated to any species of wild life indigenous to the state. Since, in the memory of man no species of Crocodylia has been indigenous to the State of New York, and none of the species of foreign Crocodylia at Bar are closer to the borders of New York than 5,000 miles, we respectfully suggest that there is no nexus between such foreign, distantly located wild-life and any species of wild-life indigenous to New York, to support New York's right to preclude the possession or sale thereof in New York.

4. The respondent's attempt to distinguish the holdings in *Hines* v. *Davidowitz,* 312 U. S. 52 and *Zechernig* v. *Miller,* 389 U. S. 429 are so puerile as to establish their distinct, direct applicability to the case at Bar.

It is manifest, we submit, that the Mason Act's interference, with the Federal Government's exclusive right to conduct foreign affairs, is at least as onerous as the Pennsylvania law, considered in the *Davidowitz* and the Oregon law considered in *Zschernig.* Indeed, we suggest that the Mason Act's intervention in foreign affairs is more direct than the intrusion of either Pennsylvania's laws or of Oregon's law because at Bar there is an immensely detailed Federal Statute directing the Secretary of the Interior and the Secretary of State to enter into bilateral and multi-lateral agreements with foreign countries to control the harvesting and commerce in species of foreign wild life considered to be endangered.

That the upholding of the Mason Act is an obvious intrusion in the Federal Government's exclusive right to

conduct foreign affairs is perhaps of less importance than the drastic consequences certain to flow therefrom.

For example, there would then appear to be no restriction upon a state prohibiting the importation and sale of a foreign country's fauna or flora, even despite the existence of a treaty,* upon that state's "finding" that the raising, growing or harvesting thereof represented an over-use (or under-use) of the foreign country's natural assets and thus a threat to the world's ecology.

The principle could be extended to the foreign country's manufactured products by similarly attacking the mining, raising, growing or harvesting of the raw materials.

Aside from the hodge-podge resulting from each state making its own, different "findings" this is a luxury this country can ill afford, especially now with its emissaries in foreign countries for the sole purpose of stimulating international trade.

CONCLUSION

The petition for a writ of certiorari should in all respects be granted.

Respectfully submitted,

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* The respondent makes this very contention (Answering Brief, p. 12, sub-head C).